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THE LAW OF THE CHILD—IN A CHANGING WORLD

LEONOR INES LUCIANO*

Mankind owes the child the best it has to give

Preamble (5), The Declaration of the Rights of the Child

Children are the supreme gifts of marriage

Gaudium et Spes, V No. 50

INTRODUCTION

When we speak of children, we refer to persons who are up to 21 years of age and who comprise one-third of the world's population. In the Third World, they account for as much as two-thirds; and twelve children die every second for want of proper care.¹

The year dedicated to them, 1979, is about to end. Since it is the 20th Anniversary of the Universal Declaration of Rights of the Child, the year was proclaimed as the "International Year of the Child." It was not intended as only a year of celebration, but as a springboard into the years ahead for active advocacy, continuous effort, and sustained development of policies, laws and services concerning their welfare and development. By focusing attention to children's needs, the United Nations encourages all countries to review their laws, programmes and services for the promotion of the well-being of children.

We realize that today, 20 years after the Declaration, the social, moral, economic, and familial conditions of our modern world have greatly changed, endangering in no little degree the well-being and future of our children. Among these changes are: new technologies in birth control and the acceptance of abortion as a means of population control; the breakdown of traditional family ties; urbanization and industrialization, thus bringing about disequilibrium and injustice; increasing confrontation between races and cultures; changes in lifestyles, human relationships,

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¹ UNICEF, THE UNICEF REPORT (1977).

and moral values; population growth in excess of available resources; environmental problems; and unequal distribution of wealth. These changes have brought about the dislocation of children leaving them more helpless.

While we are having this Congress, millions of children are dying of poverty, malnutrition, and lack of the basic needs; others are homeless, nameless, familyless, abused, abandoned, neglected and altogether unwanted; many are suffering from physical, mental and emotional handicaps; and others are inhumanly killed even before they are born. All these call for a reexamination of our laws and our services in implementation of children's rights and in upholding the dignity of the child.

It is therefore time to ask ourselves whether we have, in our law profession, done our share in infusing our Christian inspiration to those rights, transforming them into viable relevant vehicles of justice, equality, peace and love.

With deep respect for our divergent cultures and legal systems and for the varying levels of our development, we seek collaboration with one another to help the child within the perspectives of our legal training, experiences, involvements and Christian apostolates.

It is in this context that I bring to your consideration the following juridical matters:

1. The Human Rights of the Unborn Child
2. A Code for Children
3. The Juvenile Justice System
4. Intercountry Adoptions.

THE HUMAN RIGHTS OF THE UNBORN CHILD

The year 1979 was further declared as the "Year of the Unborn Child" by the Catholic Bishops' Conference.

The first right of the unborn child is the right to life: "Every child is endowed with the dignity and worth of a human being from the moment of his conception, as generally accepted in medical parlance, and has therefore, the right to be born well."² However, the conceived child is considered born for all purposes that are favorable to it provided it is delivered from its mother's womb.³ If the fetus had an intrauterine life of less than 7 months, it does not acquire civil personality if it dies within 24 hours after its complete delivery.⁴ In an American case, it was held that a "fetus, at most, represents only the potentiality of life. The unborn has never been recognized in law as a person in the whole sense. The word 'person' as used in the 14th Amendment of the American Constitution

² CHILD YOUTH WELFARE CODE art. 3(1) (PD 603).

³ See NEW CIV. CODE art. 40.

⁴ *Id.* art. 41.

does not include the unborn." In no case therefore, may considering of the fetus take primacy over the life and health of the pregnant woman.⁵ In this regard, proposals for the amendment have been advanced in Congress to provide rights to the fetus from the period of fertilization. But again, this involves a medical and a moral issue.

Be that as it may, all statutes prohibiting abortion are intended to protect the rights of the unborn child, as are statutes that provide that capital punishment shall not be applied to pregnant women.⁶ Further support for this position can be found also in paragraph 3 of the Preamble which states: "whereas, the child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth"; and the fourth Principle which provides: "special care and protection shall be provided the child and his mother, including adequate pre-natal and post-natal care."⁷

The property rights of the unborn are statutorily protected, including being beneficiaries in trust, or as heirs by will or by intestacy.⁸

Today, the right to life is often defined in terms of a medical battle against infant mortality. Society in general is very conscious of this problem since Holt and Broadbert made their contributions to bacteriology and transformed the whole approach to pediatrics. We now have the situation where more and more is being done socially, culturally, and politically to safeguard health at the expense of the right to live to enjoy it. A good example of this is the Third International Congress on Health and the Child as part of its preparation for IYC. Forty percent of it was given to the discussion of family planning and birth control.⁹

For the case of the unborn child, therefore, shall we or shall we not allow abortion? Despite the Papal Encyclical "Humanae Vitae" issued on July 29, 1968, the social climate all over the world is becoming more responsive to birth control. The strongest indicators of this trend are the changing legal concepts in the morality of therapeutic abortions; the open governmental policy in developing countries supported by United Nations funding; tax laws withdrawing exemptions to families with more than four children.¹⁰ With a few exceptions (and the Philippines included) almost all countries in the world, including countries which are predominantly Catholic, permit abortion. The most permissive abortion-on-demand is

⁵ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ American Convention on Human Rights, arts. 4 & 6, reprinted in A.H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* app. 5, at 250-51 (1972).

⁷ Horan, Frazel, Crisham, Horan, Gorby, Noonan, Louisell, *The Legal Case for the Unborn Child*, in *ABORTION AND SOCIAL JUSTICE* 105 (T. Hilgers & D. Horan eds. 1972).

⁸ *Id.*

⁹ See Verdaguer, *An Approach to the International Year of the Child*, in *CATHOLIC POSITION PAPERS*.

¹⁰ See FOOTE, *CASES AND MATERIALS ON FAMILY LAW* 583-93 (1969).

found in the Soviet Union, Bulgaria, Hungary, East Germany, China and Japan.¹¹ However, the most stabilizing factor that has constrained our morals from catching up with advances in the science of abortion and contraception has been our Catholic religion as guided by our Papal "Humanae Vitae." Today, this factor is besieged by numerous pressures. We need the help of lawyers, theologians, and practicing Catholics to provide a better understanding of "Humanae Vitae," the moral theology of abortions, and the true meaning of life.

Perhaps, in the following context can the same be explained: that the fetus is as much life as is the parent; they share the same moral status. Either can be a source of abiding anguish and hardship for the other. Sometimes there may be no escape. In this our world, some people get stuck with the care of others, and sometimes there may be no way of getting unstuck, or at least no just and decent way. "Taking the other person's life is not such a way."¹² It is murder, plain and simple. While law should not be disregarded in dealing with the population problem, it would be both unwise and unrealistic if in the adoption of legal rules pertaining to the population problem equally relevant factors were to be ignored.¹³ As Mother Theresa of Calcutta has said when she recently received the Nobel Peace Prize for 1979: "It is the rich countries which allow abortion that are really poor; for they are more concerned with their wealth than with considering the right to life of the unborn."

Indeed, at a time when almost everyone is all bothered with human rights, it is expedient that we look into the rights of the unborn child.

A CODE FOR CHILDREN

There are many strategies to help children, but their priority boils down to setting public policy and the rules. For the best interest and welfare of children therefore, and in order to stabilize their rights, laws, statutes, and basic tenets should be spelled out clearly for them and, if possible, codified, providing for their moral, mental, physical and spiritual development. When the need arises, such a Code should be open to review, updated and upgraded, in accordance with changing mores.

For after all, as Justice Cardozo stated: Law accepts as the pattern of its justice the morality of the community it seeks to regulate.

Using the doctrine of *parens patriae*, the Universal Declaration of Human Rights, the United Nations Declaration of the Rights of the Child, the Constitution of the respective country, and the other laws pertaining

¹¹ Lampe, *The World in Perspective*, in ABORTION AND SOCIAL JUSTICE 90-94 (T. Hilgers & D. Horan eds. 1972).

¹² Wertheimer, *Understanding the Abortion Argument*, in THE RIGHTS AND WRONGS OF ABORTION 26-28 (1974).

¹³ See Law and Population in the Philippines 187 (U. Phil. L. Center 1975).

to children as bases for codification, lawyers should take the leadership in collaborating with behavioral scientists, and youth representatives themselves, to provide a "Magna Carta" for children which can provide a comprehensive source of laws, procedures, and services to which concerned children, their parents, the government, and the community as a whole may regard as standards.

Among the nations which started the codification of its children's laws to fill this need for standardized rules for children was Scotland with its "Children and Young Persons Act" of 1933. It was subsequently updated in 1948, 1956, and later in 1968.¹⁴ Similar acts were later adopted in England and Denmark in the late fifties, followed by California, Colorado, Illinois, New York, Rhode Island, and other states of the United States. Today, a majority of the world communities have an updated Code for Children and Youth which includes available upgraded services in order to make their provisions relevant to children's changing needs, and the moral and social patterns of the times. In the Philippines, the Child and Youth Welfare Code was passed by Presidential Decree in 1974 by President Ferdinand E. Marcos. Commitments for the International Year of the Child includes transforming the legal rights of children, as provided for in the Child and Youth Welfare Code,¹⁵ into operational networks and systems of delivery of basic services to all children below 21, with attention to the needy groups of children and those living in underserved and disadvantaged communities. To make said services permanent, President Marcos declared a Decade for the Filipino Child, 1977-1987.

The needs, rights, and duties of the child should not be viewed in isolation.¹⁶ The focus should be on the child and his family together. Parents must be part of the target group to be included in children's codes since the natural habitat of the child is the home.¹⁷ Matters like the traditional discriminations against the illegitimate as being *nullius filius* and the cumbersome means of establishing their paternity should be eliminated. Likewise, updated provisions on support and custody of children of separated parents, child abuse and neglect, and intercountry adoptions are needed.

A Code for children therefore may not be considered complete without standards for the family and the home included, spelling out the rights, duties, and liabilities of parents. Provisions should be made for the Child and Youth Welfare and Education; Child and Youth Welfare and the Church; Child and Youth Welfare and the Community; Child and

¹⁴ See Social Work Act, ch. 49, SCOTTISH CURRENT LAW STATUTES ANN. 86 (1968).

¹⁵ See ESCAP Resolutions and Recommendations of the Regional Conference of Asia and the Pacific (1978).

¹⁶ See generally H. KRAUSE, FAMILY LAW IN A NUTSHELL 128-251 (1977).

¹⁷ See PHIL. CHILD AND YOUTH WELFARE CODE.

Youth Welfare and Labor; Child and Youth Welfare and the State; the Special Categories of Children, such as the dependent, abandoned, neglected, handicapped; and the juvenile offenders.¹⁸ Provisions should further be made for the Code's periodic evaluation and for research to make it relevant to children's changing needs.

THE JUVENILE JUSTICE SYSTEM

In the United States, the media reports that juveniles are responsible for many serious crimes.¹⁹ Similar data also come from Japan, England, Denmark, Netherlands, Germany, Sweden, and other countries. Statistics²⁰ provided by participants in a course in Juvenile Court Management at the Institute for Court Management of the American Bar Association in Denver, Colorado, show that court caseloads on juvenile crime are so appalling that federal and state governments are funding all sorts of innovative approaches in the prevention of delinquency and in the correction, treatment, and rehabilitation of youth offenders.

The doctrine of *parens patriae*, on which the juvenile justice system is based, was originally interpreted in such a way that juvenile courts became authoritarian social agencies established by law but operating with little regard for the rule of law. They had broad and noble purposes, and nearly any child, from offenders to children in need of supervision, could be caught in their wide jurisdictional net.²¹ Juvenile courts could be so paternalistic that oftentimes, the offender's right to due process was forgotten. In the United States, this was subsequently corrected by the Supreme Court in *In re Gault*²² and *Kent v. United States*.²³

Until recently, the underlying philosophy of a court dealing exclusively with children has not been generally understood and oftentimes not altogether accepted. Many say that it does not provide rehabilitation and treatment but gives offenders the worst of both worlds. Others complain that courts, social workers, probation officers, and judges are too lenient and are therefore responsible for recidivists and repeaters. Others blame irresponsible parents, media, police, peer groups, and an indifferent community. And so the "blame game" revolves.²⁴ In the meantime, crime statistics keep on climbing all over the world.

Today, the juvenile justice system of each country is faced with the need to protect individual rights of the offender and the offended, the

¹⁸ UNICEF, *THE UNICEF REPORT* (1978).

¹⁹ See PD 603 (1964).

²⁰ See generally FBI, *CRIME IN THE UNITED STATES* (1977).

²¹ See generally H. RUBIN, *JUVENILE JUSTICE: POLICY, PRACTICE AND LAW* (1979).

²² 387 U.S. 1 (1967).

²³ 383 U.S. 541 (1966).

²⁴ Tillman, *Foreward* to P. LISTON, *GEORGIA JUVENILE LAW* at iv (1973).

overcrowded jails and detention homes, and the apparently ineffective corrections. Today, the juvenile court has to reaffirm its goals as an authoritarian legal agency with full regard of the rule of law and supported by responsive social services.

Law and the behavioral sciences are the leading disciplines that make the juvenile court tick; it is for this reason that it is regarded as a socio-legal court. However, ultimately, its responsibility as an arm in the administration of justice takes primacy over others. The judge down to the prosecutors and the defense lawyers blow the whistle and not the intake, case, community or probation workers, or the police. Hence, it is to the members of the law profession who are conceded to be the leaders in the juvenile justice system that we address the following suggested actions in the interest of solving recognized problems and of upholding the dignity of the youth offender:

- 1) take the offense in insuring knowledge of the philosophy, policy, procedures and services of a court for youth offenders to the public in general and to the pillars of the system in particular:

- for the police, prosecutors and the judges and referees, to upgrade their understanding of juvenile behavior;

- 2) with the involvement of the whole community, start a Youth Offender Network, the principal aim of which is to divert youth from the system by an integration of non-judicial services to the five pillars of the criminal justice system; namely, POLICE, PROSECUTION, COURTS, CORRECTION, and COMMUNITY;

- 3) review the criteria for apprehension and commitment on the philosophy that incarceration should be the last resort and that parents should be given an opportunity to participate in the rehabilitation of their delinquent children and for reasons of economy and saving minors the trauma of separation and incarceration;

- 4) bring about changes in legislative policy towards the decriminalization of outmoded laws and ordinances where there is no indication of marked delinquent behavior, and

- 5) provide courts with more relevant goals and better management skills for the speedier disposition of cases.

Indeed, curbing juvenile delinquency is a massive task that requires the involvement of an interdisciplinary group, consisting of the police, behavioral scientists, schools, Church, and families, led by the whistle-blowers: the lawyers. And, of course, we should not discount the most important group: youths themselves.

INTERCOUNTRY ADOPTIONS

In general, there exists in developed countries a low birthrate and the difficulty of obtaining white babies for adoption, whereas there exists in developing countries an excess of unwanted children as a result of the

attrition of poverty, the Korean and Vietnam wars, changing human relationships, and the lack of proper knowledge of family planning. The result is intercountry adoptions in the modern world. The main purpose is humanitarian. As stated by Holt International Adoptions Programs Inc., one of the largest American organizations involved: "Every child has the right to grow up with security and love from parents of his own; it is his birthright. When he is without parents, mankind owes him another home."

Intercountry adoption is a special form of international adoption because it not only crosses country boundaries, but also racial, cultural and/or religious boundaries. It is because of these that developing countries consider it as the last alternative in the "best interests" of the child.²⁵

After the unsuccessful Leysin Convention of 1960 and the Hague Convention of 1965, there has been a growing interest in the contemporary international community in providing uniform laws relating to the creation and effects of adoption, and, through the standardization, in facilitating and ultimately ensuring the international recognition of adoptions effected under the laws of a particular state. The task of ensuring the universal recognition of an adoption status is important, considering the need to preserve the dignity of the adopted and his best interests, the different types of adoption, and their effects, and the divergence of cultures, meanings, and implications.

The Hague Convention was followed by the World Conference on Adoption and Foster Placement in Milan, Italy, in 1971²⁶ in preparation for an international convention to be adopted within the framework of the United Nations. But work in this field has not progressed much and ECOSOC deferred consideration. In December 1978, a UN Expert Group Meeting on Adoption and Foster Placement of Children was held in Geneva, Switzerland; but until today, no results have been publicized.

Aspects of international adoptions are at present regulated, on a wider scale, by the 1964 Hague Convention on adoption, by the 1961 convention on the protection of infants, by certain conventions on maintenance, and by the EEC Convention of 1968 on jurisdiction and enforcement of judgments, and the 1967 Council of Europe convention.

*Recognition of Foreign Adoptions*²⁷

Under the Hague Convention, all foreign adoption orders granted by any contracting party are to be recognized by any adhering state "without formality." However, such recognition of the adoption orders under article 8 of the convention must be seen in juxtaposition with other provisions of

²⁵ I.C.S.W. Asia & Pacific Regional Conference on Intercountry Adoption and Sponsorship, Australia (1974).

²⁶ See World Conference on Adoption and Foster Placement (Italy 1974).

²⁷ See generally I. DELUPIS, INTERNATIONAL ADOPTIONS AND THE CONFLICT OF LAWS (1975).

the convention. Only adoptions that have been granted by competent authorities are recognized, and such competent authorities are, under article 3, restricted to those of the state where the adopter has his habitual residence or where he is a national. Furthermore, only authorities specifically notified to the depositary under article 16 are to be considered as "competent" authorities; adoptions granted by other entities are not to be recognized under the convention. Only adoptions granted on the basis of fulfilled conditions relating to habitual residence and nationality, both at the time when the application for adoption was made and at the time the adoption order was granted are recognized under article 3.

Article 15 of the Hague Convention is a general escape clause which allows any of the convention's provisions to be disregarded when observance would be manifestly contrary to public policy.

*Recognition of Foreign Adoptions in the Absence of Treaties*²⁸

Since the Hague Convention of 1965 on the Adoption of Children has been ratified by only two countries, it has not entered into force. However, whether a country adheres to an international convention providing for the recognition of adoption orders made in other countries, there may be national rules that allow for the effectiveness of such orders. An increasing number of other states have also introduced legislation in anticipation of the entry into force of the Hague Convention and in those states foreign adoptions may then be recognized under statutory provisions although they are not yet bound by any international treaty or convention.²⁹

²⁸ *Id.*

²⁹ The author's comments on Intercountry Adoptions are partly empirical, based on her experiences as a judge of the Juvenile and Domestic Relations Court for the last 12 years where she deals with local and intercountry adoptions, guardianship, custody, and other forms of child placements. Likewise, for the last 5 years, she has been a member of the National Placement Committee of the Ministry of Social Services dealing with the matching of prospective adoptees to foreign adopters under a Memorandum of Understanding of the adopter's government, through the latter's agency in charge of adoptions. In 1971, the author also headed the Philippine delegation to the First World Conference on Adoption in Milan, Italy, and where she read the paper: *Statutory Recommendations: Legislation on Adoption and Intercountry Adoptions; with emphasis on laws from the Far East*. She has also had the personal experience of having twice escorted children for adoption in the United States; and in 1975, as a member of the team consisting of the Director of the Bureau of Child and Family, Mrs. Flora Eufemio, M.S.W., and a child psychiatrist, Dr. Cornelio Banaag, the author was commissioned to visit different European countries (on invitation of the latter) to evaluate the adjustment and acceptance of Filipino children adopted thereat.

As in Intercountry Adoptions, the author's comments are the result of empirical study. In connection with the "Code for Children," she was a member of the Study Group that prepared the original draft of the Philippine Code. For the "Rights of the Unborn Child," the author is an Annual Lecturer on "The Changing Morality of Medical Practice" at the University of the East Ramon Magsaysay Medical School. Likewise, she and a group of Catholic Women's League members wrote "A Primer on Peoplemaking," a syllabus for

It has been suggested that recognition could be based on reciprocity. This would consist of applying the same rules as those used for granting adoptions in the recognizing country. In other words, foreign adoptions would be recognized insofar as they emanate from a legal system connected with the parties.

It is also suggested that foreign adoption should be effected under the law of the domicile of the adopter, sometimes supplementing this with a requirement that the adopter and the adoptee should be residing in the forum country at the time of the adoption. Conversely, if domestic jurisdiction is based on the principle of residence, other adoptions would be recognized provided they, too, were effected on the basis of residence.

In practice, a Memorandum of Understanding is usually entered into between two countries represented by their ministers of Foreign Affairs, Justice, and Social Services, where the areas of ambiguity are spelled out clearly. Usually, the laws of the adopter and that of the adoptee are given effect in a cumulative manner, with special emphasis on the effects of adoption, including citizenship, heirship and status, the need for pre-placement and post-placement case studies, and matching in the adoptee's country.

We look forward to the realization of a UN Convention on Adoption and Foster Placement and an agreement on intercountry adoptions that would be signed and ratified by all nations. Changing world attitudes among different races are currently producing an impact which is encompassing even the process of adoption as a powerful social instrument towards world peace.

CONCLUSION

We live today in an era of "systematic interdependence" among nations and peoples who seek a unity and understanding that is deeper and wider than our diverse cultures as members of an international movement of Catholic jurists. This Congress can be a fine opportunity for us to lend substance to that principle in the legal field and to face up to the realities of living within our Faith in an affirmation of our desire to build a global community of Love, Justice, and Peace under the Fatherhood of our Lord.

Family Life Education Program parish workers, and an active member of the Pro-Life Movement. As former National President of the "Catholic Women's League of the Philippines," she is the Philippine representative to the "World Union of Catholic Women's Organizations" and Editor of the "CWAP INTERLINK," newsletter of the Catholic Women of Asia and the Pacific.